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In the

Supreme Court of the United States.

October Term, 1930.

No. 58.

OXFORD PAPER COMPANY,
PETITIONER,

v.

STEAMSHIP "NIDARHOLM," A. S. NIDAROS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

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INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statement of the case	2
Nomenclature	2
The facts	2
Assignments of error	6
Questions presented	7
Summary of argument	7
Argument	8
I. The Ship was seaworthy	8
II. The proximate cause of the loss was the weakness of the cribbing built by the Charterer	19
III. The Charterer, having erected this cribbing for its own benefit and having loaded and stowed the cargo under a charter-party which made this its duty, must bear the loss caused by the weakness of the cribbing and the improper loading and stowing	22
IV. So far as the master had any connection with the loading and stowing of the cargo, it was as agent of the Charterer	30
V. The authorities cited in the Charterer's brief	33
Conclusion	35

TABLE OF CASES CITED.

Atchison, Topeka & Santa Fe Ry. Co. v. Samuel Calhoun, 213 U.S. 1; 53 L. Ed. 671 (1908)	20
Baumvoll v. Gilchrest (Court of Appeal), [1892] 1 Q.B. 253	19
Beaver, The, 219 Fed. 134 (1915) (C.C.A. 9)	30
Blaikie v. Stembridge, 6 C.B. N.S. 894 (1859)	23
British Maritime Trust v. Munson Line, 149 Fed. 533 (1906) (D.C. N.Y.)	25
Catherine Chalmers, The, 2 Asp. M.C. N.S. 598 (1874)	24

	Page
Centurion, The, 57 Fed. 412 (1893) (D.C. N.Y.)	25
Christel Vinnen, The, [1924] P. 61	19
Corsar v. Spreckles, 141 Fed. 260 (1905) (C.C.A. 9)	25
Dana, The, 190 Fed. 650	34
Elder Dempster & Co. v. Peterson-Zochonis & Co., [1924] A.C. 522	8, 10, 19
Duche & Sons v. Schooner Twohy, 255 U.S. 77; 65 L. Ed. 511 (1921)	6
Elizabeth Edwards, The, 27 Fed. (2d) 747 (1928) (C.C.A. 2)	25
Europa, The, [1908] P. 84	19
Hamilton v. United States, 268 Fed. 15	33
Harloff v. Barber, 150 Fed. 185	11, 33
Irvine v. Hesper, 122 U.S. 256; 30 L. Ed. 1175 (1887)	6
Kaupanger, The, 241 Fed. 702 (1917) (D.C. S.D. N.Y.)	27, 33
Kish v. Taylor, [1912] A.C. 604	19
Lawrence v. Minturn, 17 How. 100; 15 L. Ed. 58	33
Manchisa v. Card, 39 Fed. 492 (1899) (D.C. S.C.)	27
Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469; 24 L. Ed. 256 (1877)	20
Munson Steamship Line v. Glasgow Co., 235 Fed. 64 (1916) (C.C.A. 2)	27
Olsen v. United States Shipping Co., 213 Fed. 18 (1914) (C.C.A. 2)	11, 27, 34
Oakley C. Curtis, The, 4 Fed. (2d) 979 (1924) (C.C. A. 2)	25
Pacific Imp. Co. v. Schubach-Hamilton S.S. Co., 214 Fed. 854 (1914) (D.C. Wash.)	32
Reed, A. E., & Co., Ltd., v. Page, Son, &c., Ltd. (Court of Appeal), [1927] 1 K.B. 743	9, 10
Republic of France v. French Overseas Corp., 277 U.S. 323; 72 L. Ed. 901	19
Rosenberg Bros. v. Atlantic Transport Co., 25 F. (2d) 739	19

Page
Santa Clara, The, 281 Fed. 725 (1922) (C.C.A. 2) 27
Santona, The, 152 Fed. 516, 518 (1907) (D.C. S.D. N.Y.) 22, 26, 31
Seguranca, The, 250 Fed. 19 34
Swainston v. Garrick, 2 L.J. N.S. Ex. 255 (1833) 25
Thomas P. Beal, The, 11 Fed. (2d) 49 (C.C.A. 3, 1926) 26, 31
Volund, The, 181 Fed. 643 (1910) (C.C.A. 2) 30
Wade v. Cockerline, 10 Com. Cas. 115 (1905) 10
Yeaton v. United States, 5 Cranch, 281; 3 L. Ed. 101 6

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Maine (R. 186) is reported in 26 Fed. (2d) 92. The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 206) is reported in 34 Fed. (2d) 442. A second opinion of the Circuit Court of Appeals on petition for rehearing (R. 208) is reported in 36 Fed. (2d) 227.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on August 21, 1929 (R. 209), and the order denying the peti-

tion for rehearing on December 11, 1929 (R. 209). Petition for certiorari was filed March 5, 1930. Certiorari was granted April 28, 1930 (R. 210). Jurisdiction is conferred upon this Court by section 240 (*a*) of the Judicial Code as amended by Act of February 13, 1925.

Statement of the Case.

Nomenclature.

Oxford Paper Company, libellant and cross-respondent in the District Court, appellee in the Circuit Court of Appeals, and petitioner in this Court, is herein referred to as the "Charterer," and A. S. Nidaros, a Norwegian corporation, claimant and cross-libellant in the District Court, appellant in the Circuit Court of Appeals, and respondent in this Court, is herein referred to as the "Shipowner." The S. S. *Nidarholm* is referred to as the "Ship."

The Facts.

The facts are stated at length in the Charterer's brief, and need not be duplicated herein, but certain inaccuracies in the Charterer's statement and certain additional facts of importance will be commented upon.

1. The *Nidarholm* is a Norwegian steamship, approximately 300 feet long and 43 feet wide. She has a flat bottom and perpendicular sides. She is a well-decked ship. Her bridge separates the two well decks, and is located about one third of her length from the bow (R. 147, 148, 149, 158).

2. The reference in the Charterer's brief (page 8) to the stranding of the Ship before she reported for taking cargo at Murray, Nova Scotia, is unsupported by any evidence in the record. The Ship's log was not in evidence. The only reference in the testimony to a stranding was the statement by the witness Harvey that he had information that the Ship had stranded prior to her reporting for cargo at the Charterer's pulp plant in Nova Scotia (R. 71). The opinion of

the District Court makes reference to a stranding, in spite of the absence of testimony in support of it (R. 187).

3. The paragraph on page 8 of Charterer's brief, entitled "Preparations for Loading," is not clear. It gives the impression that the construction of the cribbing was undertaken by the Ship and not by the Charterer. As a matter of fact, the work was in charge of one McKnight, a civil engineer employed by the Charterer (R. 32). Under his direction the fir or spruce stanchions supplied by the Charterer were set in place around the Ship's well decks and lashed at the rail (3 or 4 feet above the deck) and at the butts, with twelve-thread hemp rope, also supplied by the Charterer. These lashings were regarded by the Charterer as only "temporary" expedients to hold the stanchions in place until the deck cargo was loaded (R. 46). Lashings of wire cable furnished by the Ship *ex gratia*, were then bound around every third or fourth stanchion, and made fast to ring-bolts in the hatch coamings. Although there were 80 stanchions in all (about 20 on each side of each well deck), there were only 24 of these wire rope lashings, making about 6 on each side of each well deck (R. 171). These wire lashings were attached by the Ship's crew, under the supervision of McKnight. The Charterer also nailed to the outboard facings of the stanchions, at a point about 10 to 11 feet above the deck, a strip of heavy planking about 8 inches wide and 3 inches thick. The cribbing was completed by nailing one inch boards to the outboard facings of the stanchions (R. 33). The master of the Ship was unfamiliar with such structures, and left it to the Charterer, and it does not appear that the master was consulted at all about the dimensions or material of the stanchions and stringers, or the way in which the crib was put together (see C.C.A. Opinion, R. 207).

The athwartship lashing referred to (Charterer's Brief, p. 8) was suggested when the cribbing was being erected *before the first trip* (R. 36). Such a lashing was not again

mentioned or suggested when the Ship was being loaded for the second trip—the one on which the loss occurred (R. 36, 161).

4. When the Ship left the dock at Murray on her first trip, she behaved in the same manner as on the second trip, when the loss occurred. On both occasions she left the dock with a 5-degree list to starboard, but shifted over to 5 degrees to port when she made the turn in the stream (R. 137). On the first trip the crib stanchions held and the cargo was safely transported to Portland. On the second trip the crib stanchions gave way, and the loss occurred.

5. The action of the Ship from the time she left Murray on the second trip (when the loss occurred) until the cribbing broke, must be considered in detail. Both the Charterer in its brief (page 11) and the opinion of the District Court (R. 188) give the impression that the list of the Ship was materially greater than 14 degrees at the time the cribbing broke.

The master of the Ship testified that she was listing 10 degrees at that time, and he based his testimony upon an actual reading of the clinometer (R. 140). Carmichael, the pilot and the Charterer's only witness on this point, thought the list might have been as much as 13 or 14 degrees, although he did not look at the clinometer (R. 62). Viewing the evidence in the aspect most favorable to the Charterer, it cannot be found that the Ship was listing more than 14 degrees at the time the cribbing broke.

6. The first mishap was the breaking of the upright crib stanchions. The master testified that he had heard "a crack" (R. 140), as if "something woody was breaking up" (R. 164), and that immediately thereafter all the crib stanchions on the *port side of the forward well deck* broke, and the deck cargo there went overboard (R. 140). Thus it stands, as perhaps the primary fact in this case, that the stanchions, furnished by the Charterer, broke when the Ship listed to a point somewhere between 10 and 14 degrees.

7. It is undisputed that all of the 80 crib stanchions supplied by the Charterer broke (R. 172), while not more than 11 out of 24 wire rope lashings broke (R. 45). The first officer of the Ship, who personally examined the lashings after the accident, testified that only 7 out of the 24 were broken (R. 171) and that none of the wire lashings on the port side forward were broken (R. 175).

8. The Charterer's witness, McKnight, testified that the butts of the crib stanchions were found, after the loss, to have been pried inboard about 2 feet or more, and that all of the butt lashings were broken. He also testified that the butts of the crib stanchions on the port side forward (where the first break occurred) were pried further inboard than elsewhere (R. 42, 44).

9. The Ship made another trip under this charter-party after the trip upon which the loss occurred (R. 145). On this third trip a new cribbing was erected by the Charterer, and the stanchions used in this new cribbing were about twice as large as those which broke upon the second trip (R. 176). This time the Charterer also bought and used chains to replace the wire cable lashings that had been broken, but again used such of the wire lashings as had not been broken (R. 52).

10. All the witnesses, both for the Charterer and for the Shipowner, were in agreement that never, prior to the time when the first section of cribbing broke out, did the Ship list as far as she ordinarily might have been expected to roll from the normal action of the sea during the course of the voyage she was then beginning. The Charterer's witness, Carmichael the pilot, gave it as his opinion that the Ship should have been prepared to go from 20 to 30 degrees off the perpendicular upon such a voyage (R. 63). Even the Charterer's expert witness, Bennett, admitted that the cribbing should have been prepared to withstand a departure from the perpendicular of at least 20 degrees, with a safety factor of 6 per cent or 7 per cent (R. 116).

11. The testimony of the master and first officer of the Ship was taken by deposition, and not in open court (R. 12, 132-178). The Shipowner presented no other witnesses except one Michelsen, who testified in open court, as an expert, that it is common for lumber ships with deck loads to carry a list (R. 117). All of the Charterer's witnesses testified orally before the judge of the District Court (R. 11-116). This point is commented upon, since counsel for the Charterer appears to attempt to support the findings of the District Court as against the findings of the Circuit Court of Appeals (where they differ), on the ground that the District Court heard and saw the witnesses in person (Charterer's Brief, pp. 12, 16, 23). Inasmuch as there is little, if any, material conflict respecting the facts, the differences in the findings as between the two Courts below depend not upon the weighing of conflicting testimony, but rather upon a proper understanding of what was said. Several instances will be pointed out where findings by the District Court are not supported by the evidence.

Assignments of Error.

This case is before this Court as a Court of Appeal in Admiralty, and is therefore heard *de novo*. The entire case is opened up with the same effect as if certiorari had also been granted at the instance of the respondent Shipowner, who is therefore entitled to ask this Court for affirmative relief.

Yeaton v. *United States*, 5 Cranch, 281; 3 L. Ed. 101.

Irvine v. *Hesper*, 122 U.S. 256; 30 L. Ed. 1175 (1887).

Duche & Sons v. *Schooner Twohy*, 255 U.S. 77; 65 L. Ed. 511 (1921).

The respondent (Shipowner) therefore insists that the petitioner (Charterer) should have been held solely at fault, and assigns as error the ruling of the Circuit Court of Appeals that the fault was mutual and that the damages should be divided.

Questions Presented.

The questions of law presented are:

1. Whether a shipowner is in any way liable for the loss of a deck cargo of pulp logs stowed in a wooden cribbing erected by a charterer on the ship's deck, when the loss occurred by reason of the breaking out of the cribbing, due to its structural weakness, and the charter-party provided that the cargo should be loaded and stowed by the charterer under the supervision of the master of the ship;

2. Whether a ship is "unseaworthy," in the proper legal sense of the term, when her deck cargo is endangered although the ship herself is in no danger.

3. Whether, if the shipowner is liable, the charterer who built the cribbing and stowed the cargo in it is also liable, so as to cause the damages to be divided.

Summary of Argument.

The Ship was seaworthy in all respects when she was delivered to the Charterer.

The responsibility for loading and stowing her rested upon the Charterer, under the terms of the charter-party. The Charterer prepared her to receive cargo, and loaded and stowed a deck cargo upon her so insufficiently and negligently that it broke out and went overboard before the Ship had been subjected to half the normal strain to be expected upon a voyage like the one she was then beginning.

Since the Ship was fit to receive cargo before the loading began, and since she herself was not in danger at any time, she cannot properly be termed "unseaworthy."

The loss was therefore due to the negligent way in which the Charterer performed its duty of loading and stowing, and particularly to the weakness of the cribbing which retained the deck cargo.

Under the charter-party the master of the Ship was the agent of the Charterer as to all matters in connection with cargo, so long as the safety and navigability of the Ship was not concerned. Therefore, any action of the master with respect to the loading and stowing of the deck cargo was taken on behalf of the Charterer, and for it the Charterer is responsible.

Argument.

I.

The Ship was Seaworthy.

The term "unseaworthy" was used by both the Circuit Court of Appeals and the District Court with reference to the Ship, and the Charterer throughout its brief seems to regard this finding as conclusive of liability upon the Shipowner.

But we contend that upon undisputed facts the Ship herself was "seaworthy" within the proper meaning of that term, because neither she herself nor any part of her, nor the cargo stowed in her holds, was ever in any danger of loss, injury, or destruction. The deck cargo was badly stowed by the Charterer and it alone was in danger. It alone was lost. Therefore we contend that this is not a case of unseaworthiness, but merely of bad stowage done by the Charterer.

This distinction is clearly brought out in a recent case in the House of Lords.

> See *Elder Dempster & Co.* v. *Peterson-Zochonis & Co.*, [1924] A.C. 522.

In that case the plaintiff had chartered a deep ship, with no 'tween decks, for use in the West African trade. The Charterer loaded her with palm oil in barrels, on top of which he stowed large quantities of palm kernels in bags. The palm kernels were too heavy, the barrels containing the oil were crushed, and the oil was lost. The bills of lading issued by the ship to the plaintiff (charterer) provided that the ship should not be liable for bad stowage. To sustain a claim against the ship and her owner for the loss of the oil, in the face of this clause in the bills of lading, the charterer sought to show that the ship was "unseaworthy." The trial Court ordered judgment for the plaintiff, and this ruling was affirmed by the Court of Appeal. The judgment was reversed in the House of Lords, which held that it was solely a question of bad stowage. Lord Sumner said, at page 561:

> "Unseaworthiness is a quality of the ship, however arising. . . . Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo."

The same fundamental distinction is made by the Court in—

A. E. Reed & Co., Ltd., v. *Page, Son, &c., Ltd.* (Court of Appeal), [1927] 1 K.B. 743.

In that case the plaintiff had hired the defendant, a lighterman, to transport a cargo of pulpwood from a ship anchored in the stream. One of the lighters employed by the defendant for the work was overloaded, and sank at the ship's side. The plaintiff sued both the lighterman and the stevedore. The lower Court exonerated the stevedore,

but held the lighterman liable on the ground that the lighter was "unseaworthy" at the beginning of her voyage. These rulings were affirmed in the Court of Appeal. The language of Scrutton, L.J., is very significant. Referring generally to the relations between the ship and the cargo, he says:

> "On the other hand, the highest measure of liability as a cargo-carrying adventure, that is, of 'cargo worthiness', is when cargo is commenced to be loaded. . . . This limitation of the warranty of cargoworthiness is expressly made, because negligent stowage of a seaworthy ship is something happening after the warranty of cargoworthiness has been complied with, and, so long as the negligent stowage does not make the ship unseaworthy as a ship, does not affect a warranty which has already been complied with."

Elsewhere in his opinion (at page 755) he said, referring to the case of—

Wade v. *Cockerline*, 10 Com. Cas. 115 (1905)—

> "The ship was quite fit as a ship to carry the cargo she had on board if properly stowed; the bad stowage did not make the ship unfit as a ship, but did endanger the cargo."

In the case at bar the warranty of seaworthiness in the charter-party was satisfied when the Shipowner produced a ship which was fit to carry the cargo in question. Any injury to cargo which thereafter arose because the loading and stowing was improperly done is not to be attributed to the Ship unless the defective stowage rendered the Ship herself unsafe.

Elder Dempster & Co. v. *Peterson-Zochonis & Co.* (*supra*).

A. E. Reed & Co., Ltd., v. *Page, Son, &c., Ltd.*, (*supra*).

The necessity for making this distinction does not arise in cases where, for one reason or another, the duty of loading and stowing rests upon the vessel, as in the case of *Harloff* v. *Barber*, 150 Fed. 185, cited by the Charterer. In such cases the vessel is liable for the loss of cargo, regardless of whether or not she was in actual danger herself or whether the sole fault lay in the way the cargo was stowed upon her. Also the term "unseaworthy" is properly used in those cases which are examples of bad stowage which endangers the ship itself. A typical example of such a case is *Olsen* v. *United States Shipping Co.*, 213 Fed. 18, also relied upon by the Charterer.

But when a situation arises like that in the instant case, where responsibility for loading and stowing is expressly placed upon the charterer by the terms of the charter-party, it is essential to determine the precise effect of the bad stowage. If that improper stowage goes so far as to endanger the safety of the ship herself, she may properly be called "unseaworthy," and if that unseaworthiness is the cause of loss or damage to the cargo, the argument can be made with considerable force that the owner of the ship should stand the loss. This, in effect, was the holding of *Olsen* v. *United States Shipping Co.* (*supra*). But if the improper stowage only jeopardizes the cargo, and does not affect the safety of the ship herself, we have, as was said in the Elder Dempster case, "bad stowage and nothing more."

We submit that the case at bar presents an instance of bad stowage only. A careful reading of the record compels the conclusion. To demonstrate this we do not have to rely upon the testimony of the master of the Ship (R. 146) to the effect that his vessel was seaworthy. Bennett, the expert naval architect whom the Charterer produced as a witness, admitted that the Ship herself was never in danger. Bennett's testimony is long and technical. He had never seen the Ship and he built up his testimony upon computations

which he made from plans of the vessel which he claimed he had procured in New York, and from reading the testimony as to how the Ship behaved on the occasion in question (R. 76, 100). His computations were based upon the location of the center of gravity of the Ship when she was loaded for the voyage in question, yet he admitted that he fixed this point by estimate or guesswork (R. 111, 112, 113).

The substance of Bennett's testimony, so far as material to the issues raised on this record, is contained in the following excerpts:

(R. 91:)

"Q. 81. Now, Mr. Bennett, assuming that this same ship has proceeded down the harbor, and as she proceeded down the harbor the list increased until it got somewhere around ten degrees, or slightly over, whether or not having a port list of ten degrees and all other conditions being the same as you have heard, and read, whether or not you should consider the steamship Nidarholm in that condition a seaworthy vessel to proceed to Portland, Maine? A. In my opinion she certainly was not a seaworthy vessel.

"Q. 82. And will you please tell us why not? A. If the vessel starts out at the beginning of her voyage with a ten degree or more list, and that list is going to increase as it must in the course of consumption of feed water and fuel; coupled with the fact that the maximum righting arm of that vessel is reached at the draft stated in the testimony, when she was inclined about ten degrees; that she would probably meet with beam winds, the waves and the way; in my opinion she was in no condition to start out upon even a short trip."

(R. 109:)

"XQ. 119. Now in regard to her stability—the stability of the ship—and your various assumptions relat-

ing thereto; what have you assumed as to the condition of her tanks? A. I have assumed that her tanks were all filled.

"XQ. 120. And with regard to her coal? A. As a matter of fact, the condition of her tanks and coal didn't really enter into it. My claim that the vessel was unstable is based on the action of the vessel itself, at the dock, when she was leaving the dock, and as she proceeded down the harbor. The statement in the testimony to the effect that all the tanks were filled, merely shows me that she had no method at all in which she could overcome her instability. To illustrate: Certain lumber-carrying vessels that leave Gray's Harbor, on the Pacific coast, have to cross the bar. They are permitted to cross that bar with certain double bottom tanks not filled, in order to lighten them up to cross the bar with three or four degrees inclination, providing that immediately they cross the bar they fill those tanks. Now, those empty tanks are what you may call reserve stability. That is, you add that weight to the bottom there, which counteracts the center of gravity of a lumber cargo. The testimony as to the Nidarholm is to the effect that all the tanks were filled. Therefore, she had no possible means at all of bettering her stability condition when she left port, but the consumption of her feed water and of the coal was going to make worse conditions of stability as the voyage proceeded. Now, the amount of water and of coal had nothing to do with it at all, in coming to my opinion. It was the action of the ship itself."

(R. 103, 104:)

"XQ. 72. Now, you say that this ship could go over only eleven and a quarter degrees safely? A. No, sir. I said it would go over eleven and a quarter degrees when it reached its maximum righting arm.

"XQ. 73. *How far could it go over safely?* A. *Thirty to forty degrees, perhaps.*

"XQ. 74. *Would it have to go that far to withstand the ordinary perils of navigation?* A. *It wouldn't.*

"XQ. 75. If a ship the size of the Nidarholm gets in a heavy sea, how far will she roll off the perpendicular? A. There are so many conditions governing that, I really can't answer. Heavy wind conditions, and synchronous rolling, and waves; all kinds of conditions.

"XQ. 76. Well, if you are designing a ship that is to cross the ocean, isn't it necessary to design her so that she can roll at least thirty degrees safely? A. Yes.

"XQ. 77. Any more than thirty degrees? A. Depending on her freeboard.

"XQ. 78. What is freeboard? A. Freeboard is the amount of the side of the ship which is above the water level.

"XQ. 79. The amount of the side of the ship which is above the water-line? A. Yes. The height of the side of the ship.

"XQ. 80. And in a ship like the Nidarholm, where did you measure that? A. At the midship point, which is half way between the stem and the stern.

"XQ. 81. And what is the upper limit of your measurement? A. The statuary deck line. The weather deck line. In the Nidarholm it was the upper deck.

"XQ. 82. How much freeboard did you have on the Nidarholm? A. Four feet and four inches is allowed by the register during the summer months.

"The Court: That is, freeboard from the deck up; or from the water line up?

"A. From the deck line; or, from the water line up.

"XQ. 83. The distance between the deck and the water line? A. Yes, sir. It really is based on the amount of reserved buoyancy that is required to make a ship safe.

"XQ. 84. I understand you to say that the amount of freeboard governs the distance which the vessel may roll, before she reaches her maximum righting-arm? A. Yes, sir.

"XQ. 85. And I understand you to say that cargo has no effect upon that? A. No, sir.

"XQ. 86. What do you mean, 'No, sir'? Is that right, or didn't I understand you? A. That is right. It has no effect."

(R. 114, 115, 116:)

"XQ. 153. You said this Nidarholm would roll thirty degrees? A. Yes.

"XQ. 154. But she wouldn't keep her deckload? A. No.

"XQ. 155. What did you mean by that? A. Why, she would shoot it overboard.

"XQ. 156. Supposing the lashings and stanchions had been strong enough to keep it. Do you mean that the stanchions would break and let it go overboard? A. No. I mean she would have shot it over the top of the wooden bulwarks.

"XQ. 157. But you think she could have rolled thirty degrees safely? How do you think she could have rolled thirty degrees safely? A. If she had discharged that part of the cargo which she would have done.

"XQ. 158. Well, assuming that she didn't discharge it? A. I don't think she could.

"XQ. 159. How far do you think she could have gone over safely, without discharging part of it? Or rather, without discharging any of it? A. Probably fifteen to eighteen degrees.

"XQ. 160. On a ship like the Nidarholm, leaving for the trip like she did leave for, how much of a list or a roll should the cargo be secured—the deck cargo—be

secured to withstand? A. Probably ten degrees. Or fifteen to twelve degrees, I will say; each side of the center. Probably more. Probably fifteen degrees each side of the center.

"XQ. 161. And that means in a trip like the Nidarholm undertook you need not foresee any more than a fifteen degree departure from the perpendicular? A. No, I don't understand that.

"XQ. 162. Well, what is your margin of safety, if you are loading a deck cargo; how much of a slant off the perpendicular have you got to be prepared to meet? I am not speaking of stability now, but I am speaking of a ship either through a list or rolling from the sea—A. I understand. Why, the bulwarks in a ship like the Nidarholm should be sufficiently strong to take care of any ordinary roll that is liable to be encountered. And it is very seldom that you encounter rolls of more than twenty degrees each side of the center.

"XQ. 163. Well, does it follow, then, that if you were in charge of securing the deckload of a vessel like that that you would so secure it to withstand twenty degrees from the perpendicular? A. No, sir. You have something in mind. All construction has factors of safety in it, and when you say you construct a bulwark to prepare for a rolling of a ship twenty degrees each side of the center, nobody means that beyond twenty degrees the thing is going to damage; the thing is the factor of safety. When you get beyond that you are getting into conditions that you are going to discharge your cargo. So that while the actual load on the side may increase theoretically, it is going to decrease practicaliy because you are losing it overboard. One of the things we have to contend with is this—it is a greater menace in ships like this than the ordinary lumber carrying ship—and that is when water gets on deck; of floating the cargo.

"XQ. 164. If you were called in, as a consulting naval engineer, to advise how much pressure the stanchions must be prepared to hold in a case like the Nidarholm,—and when I say stanchions I mean stanchions and lashings—side retainers—what would be your answer, in terms of degrees off the perpendicular? A. If I was called upon to design bulwarks, without any prior experience of people who had operated these things, but designed from an engineering point of view purely, I would figure on a twenty degree roll each side of the center line of the ship, and then proportion the various structures to meet that, with probably a five to seven and a half percent factor of safety.

"XQ. 165. Twenty degrees, plus five to seven and a half degrees fact or safety? A. Not degrees. Percent.

"XQ. 166. Percent? A. Yes, sir."

The following testimony is also enlightening, when considering the several diagrams and plans which Bennett used to support his theories (R. 102):

"XQ. 61. Well, you have that picture drawn of her; that is drawn just from your conception of the situation as shown by the testimony. How far in from the rail is the center of gravity of that load? A. I have drawn this sketch in the worst possible condition I could conceive. Frankly, I think it was very much better than that. But I have pushed that outboard, and that load is as far outboard as possible, and the center of gravity there comes approximately five feet in from the inboard edge of the stanchions."

Bennett's testimony summarized, and taken in the aspect most favorable to the Charterer, goes no further than to say that the Ship, as loaded when she left her port of loading on the trip in question, would not have carried her deck

load in safety to Portland. Bennett never went so far as to say that the Ship herself was in danger at any time. In fact he admitted that she was not in danger (R. 114, 115).

There is one statement in the opinion of the learned District Judge to which reference must be made. He misunderstood or confused the testimony as to the safety of the Ship, for he says (R. 195) that while still within the harbor limits the Ship was exceeding her "angle of safety" by 3 or 4 degrees, according to the testimony of the pilot Carmichael. But Carmichael never testified on this point at all. He did testify that the Ship was listing 13 or 14 degrees at the time when the cribbing broke and the deck cargo went overboard (R. 62), but the technical term "angle of safety" was used only by Bennett, and he testified that the Ship could have heeled 30 or 40 degrees without danger to herself (R. 103). It seems evident that the learned Judge of the District Court confused the terms "maximum righting arm" and "angle of safety," both of which were injected into the case by the expert, Bennett. The District Court quite evidently took Bennett's testimony that the Ship exceeded her "maximum righting arm" to mean that she went beyond her "angle of safety." Of course, this was not the case, and Bennett's testimony carefully distinguishes between the two. Undoubtedly the learned District Judge was greatly influenced in his view of the case by this fundamental confusion of terms. It is difficult, for this reason, to place any weight at all upon the findings of the District Court on this point.

It is submitted that the testimony of the Charterer's own witnesses goes no further than to support the following propositions:

(*a*) The Ship should have been so loaded and stowed that she could safely heel over between 20 and 30 degrees, from any cause whatever (R. 116, 63).

(*b*) When the cribbing holding the deck cargo broke out, the Ship had only just reached, or at the most slightly exceeded, her "maximum righting arm" (R. 88, 62, 140).

(c) That the Ship could have heeled from 30 to 40 degrees without danger to herself, although before reaching such an angle her high deck cargo would have been sluiced overboard (R. 103, 114).

The fitness of the Ship herself for the venture is conclusively established by the fact that she made three voyages loaded with pulp wood from Murray to Portland without mishap of any kind except upon the single occasion when the crib structure erected upon her deck by the Charterer gave way.

II.

The Proximate Cause of the Loss was the Weakness of the Cribbing Built by the Charterer.

In the case at bar the Charterer asserts that the Ship was so overloaded that she was "unseaworthy." It has been shown above that this is not so, if the term "unseaworthy" is given its proper meaning. But even if it were so, it does not aid the Charterer in its attempt to impose liability upon the Shipowner unless this condition of unseaworthiness was the *proximate cause* of the damage to the cargo.

Republic of France v. *French Overseas Corp.*, 277 U.S. 323; 72 L. Ed. 901.

The Europa, [1908] P. 84.

Baumwoll v. *Gilchrest* (Court of Appeal), [1892] 1 Q.B. 253.

Kish v. *Taylor*, [1912] A.C. 604.

The Christel Vinnen, [1924] P. 61.

Rosenberg Bros. v. *Atlantic Transport Co.*, 25 F. (2d) 739.

Elder Dempster v. *Peterson-Zochonis & Co.*, [1924] A.C. 522.

It is plain from the record that the proximate and efficient cause of the loss was the fact that the cribbing, con-

structed by the Charterer, was not strong enough to hold the cargo which the Charterer put in it.

To constitute a proximate cause creating liability for negligence, the injury must have been the natural and probable consequence of the negligent act or condition. When the act is done or the condition created, it must have been apparent to a reasonably prudent man that the injury would probably occur as a result of his negligence.

> *Atchison, Topeka & Santa Fe Ry. Co.* v. *Samuel Calhoun*, 213 U.S. 1; 53 L. Ed. 671 (1908).
> *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469; 24 L. Ed. 256 (1877).

When the cribbing broke and spilled the deck cargo overboard the Ship had departed from the perpendicular not more than 13 or 14 degrees. This was the estimate of the pilot, who was produced as a witness by the Charterer (R. 62). The master, who based his testimony upon his reading of the Ship's clinometer at the time the accident occurred, said that the list was 10 degrees (R. 140). All of the witnesses who testified on the point agreed that a ship might normally be expected to heel over from the perpendicular, by rolling in a normal seaway, at least 20 degrees, and possibly 30 degrees (R. 63, 116). It follows that any experienced stevedore charged with the duty of loading and securing the deck cargo put on the Ship upon the trip in question would have recognized it as a part of his duty to load and stow that cargo in a way which would resist this normal strain.

But the cribbing broke out before the Ship had rolled one half as far as she might normally be expected to roll. Whether this was due to the insufficiency of the stanchions, or to the fact that the lashings at the butts were not properly secured for the second trip, thus allowing the whole structure to take an outboard slant above the rails during the loading, is immaterial. Whichever was the cause (and

these seem the most likely explanations of the loss), it arose from a matter over which the Charterer alone exercised supervision and control, viz., the character and construction of the cribbing.

In addition to the certainty that the Ship would roll somewhat, due to the normal action of the sea, it was apparent in this case, when the Charterer completed the loading, that the Ship would carry a list. A list was to be expected in a ship carrying a high deck cargo. The master and Captain Michelsen both testified to this effect (R. 122, 123, 143, 144).

The Ship had carried a list on the first trip (R. 136, 137). She actually had a list as she lay at the dock before the second trip was begun, but neither the stevedore, McAulay, nor the engineer, McKnight, suggested that any cargo be taken off, or that the cribbing be strengthened in any way. The master of the Ship was satisfied as to the safety of his vessel, and the Charterer's agents were satisfied with their cribbing. See McAulay's testimony (R. 31). The loss occurred before any question of the *Ship's safety* arose. The Charterer's witness, Bennett, admitted that it never would have arisen (R. 114). But the Charterer's cribbing broke before it had been subjected to half the strain to which it might normally have been subjected during the voyage had the Ship carried no list at all.

Can it be doubted, in view of these facts, that the inherent weakness of the cribbing was the proximate cause of its breaking, and of the resulting loss? This was the view of the Circuit Court of Appeals (R. 207, 208).

The precautions which were taken to guard against another such loss when the cargo was loaded for the third trip under the charter-party are significant. It would naturally be expected that the Charterer would seek to remedy the condition which caused the loss on the previous trip. But the Charterer paid no particular attention to the amount of cargo that was loaded on this third trip, and the

ship actually began the voyage with about the same list that she had on the second trip (R. 145). However, on the third trip (the one following the loss of deck cargo) the new uprights, produced by the Charterer for the erection of a new cribbing, were doubled in strength (R. 176, 51), and, furthermore, the Charterer used heavy chain lashings to secure them (R. 176, 51, 52).

This shows what the Charterer, at that time, thought was the best way to make sure that there would be no repetition of the loss, and it fits in precisely with all the other evidence in the case as to the cause of the loss.

III.

The Charterer, having Erected This Cribbing for Its Own Benefit and having Loaded and Stowed the Cargo under a Charter-Party which made This Its Duty, must Bear the Loss Caused by the Weakness of the Cribbing and the Improper Loading and Stowing.

The respective obligations of the parties in this case are entirely governed by the terms of a written charter-party (R. 179-185). It is a time charter in the usual "government form." By its terms the "whole reach of the vessel's holds, decks and usual places of loading and accommodations of the ship (*not more than she can reasonably stow and carry*)" was at the Charterer's disposal (clause 7, R. 181). Although there was no demise of the Ship, there was an "estate carved out of the ship and handed over for a specified term to the charterer."

> *The Santona*, 152 Fed. 516, 518 (1907) (D.C. S.D. N.Y.).

The Charterer had the right to carry such cargoes as it saw fit, and the charter money to be paid for the use of the Ship had no relation to the amount or character of the cargo

carried, since the hiring was on a time basis, viz., three months (R. 179).

So far as all matters pertaining to cargo are concerned, the Charterer was given full control of the situation, even to the extent of making the master of the Ship the agent of the Charterer "*as regards employment or agency*" (Charter-party, R. 181), and the charter-party further provides that the—

> "Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

The Shipowner contends that under such a charter the owner has no control over or responsibility with respect to matters of loading and stowage, *except as to such matters as might affect the navigability or safety of the Ship itself.*

Both the English and American cases bear out this contention:

Blaikie v. *Stembridge*, 6 C.B. N.S. 894 (1859):

In this case a shipowner chartered his vessel under a charter-party which contained the following provision:

> "Stevedore . . . to be appointed by charterer, but to be paid by and to act under captain's orders."

The charterer set the vessel up as a general cargo carrier, and plaintiff's goods were damaged by charterer's stevedore in the loading operation. Plaintiff sued the master of the vessel. Judgment for the defendant. The Court (p. 908) says:

> "It appears, therefore, that a stevedore has from early times been known as an agent distinct from the crew, and that for his conduct when appointed by the shipper, the master is not responsible."

In commenting on the phrase "act under the captain's orders" the Court says, at page 908:

> "The stevedore was to be appointed by the charterer, and therefore to act for him and represent his interests. For this purpose, he had the charge and custody of the goods until they were laden and stowed on board. The master, on the part of the owners, *with a view to the trim and safety of the ship*, had control over the stevedores; but there was no stipulation that he should in any other way assist the latter." (Italics ours.)

It is important to note that in the case cited above the cargo was owned by a third party, whereas in the case at bar the cargo was owned by the Charterer itself, who did the loading and stowing.

The Catherine Chalmers, 2 Asp. M.C. N.S. 598 (1874):

In this case the charter-party provided:

> "Vessel not to be ballasted with anything prejudicial to the cargo, and to be stowed by charterer's stevedore at risk and expense of vessel."

Charterer's stevedore stored wine so that the casks strained in heavy weather and leaked on the rest of the cargo, damaging it. The owner of the damaged cargo sued the ship. Judgment was for the ship, the Court holding that, so far as the damage was due to bad stowage, it rested upon the Charterer. The Court said:

> "The stevedore, who is the agent of the charterer by the terms of the charter party, had an empty ship and might have stowed the cargo as he saw fit, *subject only to the master's control in matters affecting the safety of the ship;* yet with all his knowledge of the subject

the stevedore deliberately places the wine and nuts in the way that has been proved." (Italics ours.)

See also—

Swainston v. *Garrick*, 2 L.J. N.S. Ex. 255 (1833).
The Centurion, 57 Fed. 412 (1893) (D.C. N.Y.).
Corsar v. *Spreckles*, 141 Fed. 260 (1905) (C.C.A. 9).
British Maritime Trust v. *Munson Line*, 149 Fed. 533 (1906) (D.C. N.Y.).
The Oakley C. Curtis, 4 Fed. (2d) 979 (1924) (C.C.A. 2).

See also—

The Elizabeth Edwards, 27 Fed. (2d) 747 (1928) (C.C.A. 2):

In this case a vessel was overloaded with a deck cargo of nitrate of soda, causing the deck seams to open and admit water to the hold and damaging the cargo. There was no written charter-party. The Court found that the shipper agreed to assume the risk of injury to his cargo by reason of such overloading. The ship was a private and not a common carrier, and the Court held the agreement legal and binding upon the shipper, but added the following significant words:

"Even in the absence of such a specific agreement it may perhaps be doubted whether the ship would be responsible for damage caused solely by bad stowage by the shipper's stevedores. See The Thomas P. Beal, 11 F. (2d) 49, 52 (C.C.A. 3); The Oakley C. Curtis, 4 F. (2d) 979, 981 (C.C.A. 2). But we prefer to rest our decision upon the court's finding, for which there is warrant in the evidence, that the shipper agreed to take the risk."

The suggestion may be ventured that the reason the Court preferred to rest its opinion on the special agree-

ment was that the improper stowage affected the structure of the ship itself, and thus presented a very close question as to whether the type of unseaworthiness involved the vessel herself, or only the cargo. Yet a reading of the decision leads to the conclusion that, even had there been no such special agreement, the Court would nevertheless have exonerated the ship; and it is submitted that this result could have been reached in conformity with the precedents if, as a practical matter, the unseaworthiness jeopardized only the cargo, and not the vessel herself.

The Thomas P. Beal, 11 Fed. (2d) 49 (C.C.A. 3, 1926):

In this case the Court of Appeals for the Third Circuit had before it the question of the responsibility for bad stowage as between the owner of a ship and a time charterer, for damage done to a third party's cargo. The charter in question was apparently in the usual "government form," and contained provisions like those in question in the case at bar. The Court found that the charterer did the stowing by its own stevedores, just as in the case at bar. The Court held the charterer liable and exonerated the ship, and in so doing used the following language, at page 52:

> "On the issue of liability for bad stowage, as between the time charterer and the shipowner, the time charterer relies mainly on cases which hold generally, and very properly, that responsibility for the seaworthiness of a chartered ship is on the shipowner. [Citing cases.] But that, generally, means responsibility for seaworthiness of the ship as against perils of the sea; it does not, in every instance, mean responsibility for her seaworthiness in respect to stowing cargo."

See also—

The Santona, 152 Fed. 516, 518 (1907) (D.C. S.D. N.Y.).

The Santa Clara, 281 Fed. 725 (1922) (C.C.A. 2).
Manchisa v. *Card*, 39 Fed. 492 (1899) (D.C. S.C.).
Munson Steamship Line v. *Glasgow Co.*, 235 Fed. 64 (1916) (C.C.A. 2).
The Kaupanger, 241 Fed. 702 (1917) (D.C. S.D. N.Y.).

Both the Charterer and the learned District Judge appear to rely principally upon the case of—

Olsen v. *United States Shipping Co.*, 213 Fed. 18 (1914) (C.C.A. 2):

This was a suit by a shipowner against a charterer to recover the amount which the shipowner had been obliged to pay to a third party who held bills of lading issued by the master, for the loss of deck cargo *which the master had jettisoned* to save the ship from capsizing. The charter was in "government form," which, as in the case at bar, required the charterer to load and stow the cargo. There was a dispute as to whether too much deck cargo was being put on, but, after a survey which decided against the contentions of the master, more deck cargo was loaded, and the ship left port with a list of 11 degrees. The cargo consisted of heavy logs loaded both under and on deck. Although there was no stress of weather the list increased to 24 degrees, and the master, believing that his ship was in danger of foundering, jettisoned a part of the deck cargo to save the ship from disaster. The value of the jettisoned cargo was the subject of the litigation. The District Court found in favor of the ship, but this decree was reversed by the Circuit Court of Appeals, which held the ship responsible on the ground that the ship herself was in an unseaworthy condition at the time of the loss, and that this unseaworthiness caused the loss of the cargo. But in reaching this conclusion the Court recognized the distinction between a con-

dition of unseaworthiness which affects the safety of the ship itself and a condition of unseaworthiness which pertains only to the safety of the cargo. The Court said:

> "It is true that when charterers load cargo against the protest of the master in such a way that it is itself damaged and or damages other cargo, the charterer will be liable. The Centurion (D.C.) 57 F. 412. Likewise when cargo loaded on deck by agreement is lost because of a peril of the sea the ship will be excused. Lawrence v. Minturn, 17 How. 100; 15 L. Ed. 58. We are not willing to extend this to such a loading *as makes the ship herself unseaworthy* when no sea peril is encountered. It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the *ship herself*." (Italics ours.)

In the Olsen case, therefore, the Court was dealing with a case where the master himself thought that his ship was unseaworthy when she left port, using the term "unseaworthy" in the sense that her own safety was endangered. And events proved this to be the case. It was not a case where the overloading or bad stowage affected only the safety of the cargo. On the contrary the master allowed himself to be overriden by the charterer with respect to a matter that was peculiarly within the master's own province, viz., the safety and navigability of his ship, and this point is stressed by the Court in deciding the Olsen case.

This distinction between the rights and obligations of the master of a chartered vessel, with respect to the safety and navigability of the ship on the one hand and matters involving only cargo on the other, runs through all the cases above cited. It is based not only upon practical considerations involved in the shipping business, but also upon the express provisions of charter-parties similar to the one in the case at bar, which imposed upon the Charterer the duty

of loading and stowing, and which turned over to the Charterer the entire cargo-carrying capacity of the Ship.

In the case at bar, regardless of the precise provisions of the charter-party, there can be no doubt but that the Charterer took active charge of building the cribbing and stowing the cargo in it. The Circuit Court of Appeals says (R. 207):

> "The work was planned and done by the Charterer's men under the supervision of its Superintendent. The master of the Nidarholm said that he was unfamiliar with such structures and left it to them. The steamer supplied ex gratia at the Charterer's request some of the lashings and her men made them fast. The master does not appear to have been consulted at all about the dimensions or material of the stanchions and stringers or the way in which the crib was put together. He was consulted about the lashings and expressed the opinion that one reaching from side to side at the foremast was unnecessary."

The character of these stanchions, the way they were placed and secured, were all matters of no interest to the master or the Shipowner. The master had never seen them placed and secured as the Charterer proceeded to place and secure them in this case (R. 158). On the other hand, the Charterer's engineer had prepared at least ten other ships in the same way (R. 33), and the Charterer's stevedore had loaded over a hundred ships in the same manner (R. 13, 33).

Wholly apart from precedent and the precise terms of the charter-party, it would be inequitable and unjust to place upon the Ship the responsibility for the negligent way in which this work was carried out, particularly as it was undertaken solely for the financial interest of the Charterer, viz., in order to transport as much cargo as possible during the period of the charter. In whatever light the

obligations of the parties in this case are considered, the fact remains that the Charterer undertook to build the cribbing, and to load and stow the cargo therein, and that its performance was negligent and insufficient. For this negligence the Charterer stands charged with fault, and no technical argument can relieve it of this burden.

IV.

So Far as the Master had Any Connection with the Loading and Stowing of the Cargo, it was as Agent of the Charterer.

Clause 8 of the charter-party (R. 181) provides:

> "The Captain, (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment or agency and charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign bills of lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

This is a common clause in time charters, obviously designed to meet the practical needs of a situation where the master of a vessel acts in a dual capacity—as agent of the shipowner for certain purposes, and as agent for the charterer for other purposes. So far as the actual navigation of the ship is concerned, the master remains the agent of the shipowner, who becomes responsible for the master's errors in seamanship.

The Volund, 181 Fed. 643 (1910) (C.C.A. 2).

But this rule is limited to matters involving the management of the ship itself, as contrasted to matters where the master acts solely with reference to cargo.

See *The Beaver*, 219 Fed. 134 (1915) (C.C.A. 9)—

where the Court said:

> "Where the officers of the vessel are agents of the owners as to certain matters and of the charterers as to others, they will be regarded as agents of one party or the other according to the work on which they are engaged."

See also *The Santona* (*supra*).

In *The Thomas P. Beal* (*supra*), the Court, in speaking of a charter-party like the one in the instant case, said:

> "The terms of the charter party made it certain there was a letting of the ship as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee whereas, in the latter, the relation is that of carrier and shipper. (Citing cases.) According as it is one or the other the question arises whose agents wrought the injury, and there is suggested the inquiry put by Lord Esher in 1 Q.B. 258: 'When is a captain the owner's captain?' Transposing the question, we ask: 'When is the captain the charterer's servant?' Directing these inquiries to the case in hand, it is clear that, within the law of The Santona (C.C.) 152 F. 516, 518, opinion by Judge Hough, while the owner did not surrender possession or control or command or navigation of the ship, 'he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship (was) the owner's ship, and the master and crew his servants for all details of navigation and care of the vessels; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew (were) the servants of the charterers.' And so the parties in this case construed the charter

> party, for it is perfectly clear that the charterer, first at one port and then at another and finally at San Francisco, booked the freight, designated the places of stowage, did the stowing itself through its own stevedores, and assumed all responsibility therefor. On the issue between the charterer and the ship we find the charterer liable."

The relation of the master to the charterer in such a case is well expressed in the case of—

Pacific Imp. Co. v. *Schubach-Hamilton S.S. Co.*,
214 Fed. 854 (1914) (D.C. Wash.)—

where the Court, in discussing an agency clause similar to the one in the case at bar, said (p. 860):

> "These provisions, so far as orders, directions, instructions and control upon the part of the charterer are concerned, contemplate such orders as the charterer sees fit to give in the matter of cargo, fuel, loading, unloading, the time of departure from ports, the ports to be made, the order in which made, the wharves, or means to be used in loading or unloading, and similar directions concerning the voyage, and were, evidently, the only ones in contemplation."

This being the state of the law, it is immaterial that the learned District Judge found as a fact that the master of the Ship personally supervised and bossed the loading, trimming, and securing of the cargo (R. 199), although the evidence does not warrant such a finding. The only thing the master had to do with the loading and stowing of the deck cargo was the placing of 15 additional cords of wood on the vessel, only five of which were put forward where the first loss occurred (R. 17). Such a small addition to the Ship's deck load could not have had any appreciable effect upon her stability.

There was no evidence whatever that the master had anything at all to do with the stanchions, or the manner in which they were placed against the Ship's bulwarks. As already noted, the Circuit Court of Appeals finds plainly that this work was planned and done by the Charterer's men under the supervision of its superintendent (R. 207).

V.

The Authorities Cited in the Charterer's Brief.

The only case decided by this Court referred to in the Charterer's brief is—

Lawrence v. *Minturn*, 17 How. 100; 15 L. Ed. 58.

This case arose under circumstances entirely different from those in the case at bar. There was no charter-party at all in *Lawrence* v. *Minturn*. The duty of loading and stowing was carried out by the shipowner. And this Court actually exonerated the ship of any responsibility for loss caused by the jettison of a deck cargo, it being shown that the ship herself was in peril.

The case of *Hamilton* v. *United States*, 268 Fed. 15, involved the refusal of seamen to serve on a ship incapacitated by the loss of her propeller. The ship was held to be seaworthy, and consequently the seamen were not excused from liability for conspiracy to revolt. The case has no bearing on the responsibility of a ship for loss of cargo.

The reasoning and holding of Judge Learned Hand in the case of *The Kaupanger*, 241 Fed. 702, supports the contentions of the Ship rather than those of the Charterer in the case at bar. The case is cited by us on page 27, above. The opinion recognizes the liability for proper stowage on the part of a charterer who assumes the duty of loading and stowing, and it cites with approval the same English cases which we cite above (pages 23, 24, 25).

Harloff v. *Barber*, 150 Fed. 185, is a typical example of the general rule that, in the absence of an agreement to the contrary, the duty of loading and stowing rests upon the owner of a chartered vessel, and upon the master as his representative. There is, however, an express "agreement to the contrary" in the charter-party in the present case, by the terms of which the Charterer undertakes to do the loading and stowing, and by which the master is made the agent of the Charterer.

In *The Seguranca*, 250 Fed. 19, the master required part of the cargo to be unloaded in order that his vessel might sail in a seaworthy condition. The Court held the shipowner liable for the cost of this work and the resulting loss of cargo space. But there the only duty upon the charterer was to furnish a stevedore.

It appears from the opinion that the Court found as a fact that the master permitted or even approved the stevedore's method of stowage, but later required the partial discharge of cargo. Presumably the master did this to ensure the safety of the ship herself. It is submitted that the case does not support the Charterer's contentions.

In *The Dana*, 190 Fed. 650, it appeared that, due to a bad leak and the shifting of water in her tanks, the vessel developed such a list that her deck cargo was lost. The owner was held liable on the grounds that the sole cause of the loss was the negligence of the crew in respect to matters directly involving the safety of the ship. No question of bad stowage was involved in the case.

The case of *Olsen* v. *United States Shipping Co.*, 213 Fed. 18, has already been commented on *supra* (pp. 27, 28).

Conclusion.

From the above consideration it is submitted that the Charterer should be held solely at fault for the loss in question. If, however, this Court should be of the opinion that there was some fault on the part of the Shipowner which contributed to the loss, then the rule of divided damages should be applied, as was done in the Circuit Court of Appeals.

Respectfully submitted,

ROBERT E. GOODWIN,

Proctor for Respondent.